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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/821,376	03/29/2001	David Kee Yang	8491	3463

27752 7590 05/14/2007

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EXAMINER	
PRATT, HELEN F	
ART UNIT	PAPER NUMBER
1761	

MAIL DATE	DELIVERY MODE
05/14/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	09/821,376	YANG ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *21 March 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-6,8-11,13-18 and 20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-6,8-11,13-18 and 20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-4, 8-11, 13-18, 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Product Alert (v. 328, n. 11) in view of Peroutka (US 2002/0122815 A1).

Product Alert discusses the product "Cinagro Energy Plus Healthy Whole Body Tonic" that contains juices, green tea, several B vitamins and agave nectar. Green tea contains flavonals and bracers such as caffeine and cachecan. Claims 1-3, and 6, 9 differ from the reference in the particular Glycemic Index (GI) and in the particular amount of fructose in the composition. It is known that juices contain various sugars such as fructose and sucrose. Peroutka discloses that it is known to administer low Glucose Index (GI foods) such as fructose (page 4, para. 0048, lines 1-13). The reference discloses that a functional food product can have a low GI of less than 50 preferably less than 30 (page 5, col. 1, lines 1-6). Therefore, if one wanted to produce a composition with a glycemic index of 55 or less , it would have been obvious to use the teaching of Peroutka which disclose that fructose slows the digestion of carbohydrates. It would have been obvious to use juices containing fructose in amounts

which would produce a low GI as shown by Peroutka and to make a product having a GI of less than 55 in the composition of Product Alert.

Claim 4 further requires at least 50% of water in the composition. Generally beverages contain at least 50% water or else they would be a concentrate. Nothing is seen that the composition of Product Alert does not contain the claimed amount of water since it is a beverage and not a concentrate. Therefore, it would have been obvious to make a beverage composition with at least 50% water.

Claim 8 further requires particular amounts of flavanols and bracers in the composition and claim 11 particular amounts of B6. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a beverage product, properties such as nutrition and ingredients to allow for alertness are important. It appears that the precise ingredients as well as their proportions affect the nutrition and degree of alertness allowed of the product, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to optimize the amounts of flavanols and bracers to give characteristics such as nutrition and alertness to the composition.

Nothing new is seen in the use of soluble fiber as in claim 10, which is found in the juices of the reference to Product Alert. Complex carbohydrates are an obvious addition to a beverage. Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Claim 13 further requires various amounts of ingredients and a GI of less than about 35. Peroutka discloses a GI of less than 30 as above. In re Thorpe, supra again applies. Therefore, it would have been obvious to make a product containing particular amounts of ingredients using a low GI index.

The limitations of claims 14 –17 have been disclosed above and are obvious for those reasons.

Claim 18 is to a kit containing the claimed composition. However, beverages are known as claimed whatever type of packaging they are housed in. Carriers for bottles are well known as in 6 packs. Since nothing more than a kit is claimed and the beverage, it is seen that it would have been obvious to bottle the above composition and put it in a box to make a kit.

Claim 20 further requires administering the claimed composition to a mammal in order to enhance the perceived energy of the mammal. However, the claimed ingredients have been shown in combination. Caffeine, which is known to be contained in the composition, is known for its stimulating effects. Nothing has been shown that the claimed composition contains any more stimulating effects than the products of the combined references. Therefore, it would have been obvious to use the composition as disclosed by the combined references for its stimulating effects.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of XP-002208458 –(Jakarta ginger, applicant's reference)

Claim 5 further requires the use of 2% total free sugars, which can be glucose, sucrose and maltose. Jakarta Ginger discloses a ginger and green tea that contains less than 2% sugars (product page). Sugars are generally considered to be sucrose unless otherwise stated. Therefore, it would have been obvious to make a product containing less than 2% sugars as shown by Jakarta ginger in the composition of the combined references.

ARGUMENTS

Applicant's arguments filed 3-21-07 have been fully considered but they are not persuasive. Applicant argues that the reference to Product Alert does not show all the claimed limitations. However, the rejection is not a 102 anticipation type rejection, but a 103, obviousness type rejection, where a secondary reference can modify the primary reference.

Applicants argue that there is no motivation to combine the references and there is no reason in Product Alert to modify the reference. However, motivation does not need to come from the primary reference. A lot is known about the glycemic index (GI) at this point as shown by Peroutka, in particularly, to use a low GI if one wants to make a product, which does not raise the blood sugar level. Peroutka discloses that it is known to "administer low GI foods , that after ingestion produce less rapid changes in the serum glucose than are observed after a high GI carbohydrate food such as glucose is ingested" (page 4, par. 0048). It is generally known that the body efficiently uses glucose to produce energy, whereas fructose requires more steps to be used for energy by the body, thereby producing a lower GI response. This is why fructose can be used as a sweetening agent for diabetics, but not glucose due to an impaired insulin response to glucose.

It is not surprising that the claimed composition, which has a low GI enhances the perceived mood and energy for the consumer, because that is what caffeine does and the glucose index is not raised using fructose nearly as much as it would be for sucrose and glucose.

Even though Product Alert does not teach a particular amount of fructose, Peroutka discloses that it is known to use low GI carbohydrates such as fructose, which would not cause a rise in blood sugar. Applicant's composition cannot be said to provide much energy due to the low amount of fructose at any rate. The reference also is to administering effective functional foods that modulate glucose levels and involves

administering calculated amount of functional ingredients (fructose in this case) to "fuel" the energy need of the brain and body (0044 and 0046).

Applicant argues that Product Alert does not teach all the claimed elements. However, it does teach all the composition ingredients except for the use of .1-10% fructose. Fruit juices contain fructose and glucose. Nothing has been shown in general that at least .1% of fructose is not found in fruit juice. A certain amount of sugar has to be in fruit juice in order for them to be sweet. It would have been within the skill of the ordinary worker to use enough sugars such as fructose to provide energy to an individual, particularly if no glucose was to be used.

The reference to Peroutka is a secondary reference, which does not need to show each and every limitation, but that is combined with the primary reference to Product Alert to show that it is known to use sugars such as fructose to regulate the glucose index.

Applicants argue that there is no motivation to combine the references as there is no teaching of .1-10% fructose. However, nothing critical is seen in using a low amount of fructose. If one does not want to elevate the GI then a low amount can be used. Nothing has been shown that fruit juice of PA does not have the claimed amount of fructose.

The motivation to combine the references is that the claimed composition is known except for the particular amount of fructose. Peroutka discloses that it is known to regulate the amounts of foods so that there will be a low glycemic index and a low glycemic response.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should

you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 5-10-07

HELEN PRATT
PRIMARY EXAMINER